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The Right of Innocent Passage: A Case Study on Two Koreas

Stephen Kong*

INTRODUCTION

On June 2, 2001, three North Korean merchant ships entered the body of water between the southern end of the Korean peninsula and Cheju Island.¹ The event stirred up much alarm in South Korea,² because no ship from either South or North Korea had ever attempted to sail through the other's territorial sea.³ The North Korean ships did not announce their intention to sail through the area.⁴ The South Korean navy repeatedly communicated with the North Korean ships and urged them to leave their territorial sea.⁵ The North Koreans refused, arguing, accurately, that ships of other nations had sailed through the

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1. See Keui-Keun Kim, *One North Korean Ship is Currently Sailing Through the South Korea's Ocean*, CHOSUN DAILY (June 3, 2001), at <http://www.chosun.co.kr>; *North Korean Merchant Ships Violate South Korean Territorial Waters* (June 7, 2001), at <http://www.koreasociety.org/TKSQ/NewsReview/NewsReview%20Summer%202001.htm>; *Right of Innocent Passage*, KOREA HERALD (Jan. 23, 2002), at http://www.koreaherald.co.kr/SITE/data/html_dir/2001/20010606046.asp.

2. See Kim, *supra* note 1.

3. See Yong-Won Yoo, *"The Right of Free Passage" is the Right for Non-Military Vessels to Sail Through Other Nation's Ocean During Normal Circumstances*, CHOSUN DAILY (June 3, 2001), at <http://www.chosun.co.kr> (source only available in Korean).

4. See In-Gu Kim & Yong-Won Yoo, *Why did the North Korean Merchant Ships Sail Through Cheju Strait Without Permission?*, CHOSUN DAILY (June 3, 2001), at <http://www.chosun.co.kr> (source only available in Korean).

5. See *id.*

area without previous notification or arrangement.⁶ The South Korean navy later came under public criticism for failing to expel the North Korean ships.⁷ Some even criticized the navy for its failure to use force against the North Korean ships.⁸

If North Korean ships sail through the body of water in question, instead of sailing through the high seas, they shorten their routes by more than three hundred nautical miles.⁹ Consequently, they shorten their voyages by a day or two and save money on fuel and other expenses.¹⁰ North Korea currently faces severe economic problems, especially a shortage of fuel,¹¹ which makes use of this shipping route an economically efficient courts of action.

This Note analyzes the legality of the actions taken by the two Koreas. Part I discusses the political situation between North Korea and South Korea, the relevant maritime laws, and the significance of the incident on international trade. Part II discusses three issues: first, it analyzes whether North Korea's passage on June 2 was innocent; second, it determines whether South Korea could lawfully deny the right of innocent passage to North Korea in general; and third, it examines whether the South Korean navy could have used force against the North Korean ships on June 2. South Korea hastily concluded that the action taken by the North Korean ships was innocent and granted the right of innocent passage to North Korea in Cheju Strait.¹² While South Korea's previous denial of the right of in-

6. See *id.*; Chung-Ho Yoon, *Record of Communication for North Korean Vessels that Invaded the Territorial Sea*, CHOSUN DAILY (June 14, 2001), at <http://www.chosun.co.kr> (source only available in Korean).

7. See Sung-Kyu Ahn, *The Military is under Criticism for its Timid Response to North Korean Merchant Ships*, JOONGANG DAILY (June 6, 2001), at <http://www.joongang.co.kr> (source only available in Korean); see also Kim, *supra* note 1; Keui-Keun Kim, *Interview [with the South Korean navy officer]*, CHOSUN DAILY (June 3, 2001), at <http://www.chosun.co.kr> (source only available in Korean).

8. See Editorial, *How Long Shall We Tolerate Military Incompetence?*, JOONGANG DAILY (June 16, 2001), at <http://www.joongang.co.kr> (source only available in Korean).

9. See Kim, *supra* note 4.

10. See Chul-Heui Lee, *The Calculated Trespass into the Territorial Sea*, JOONGANG DAILY (June 4, 2001), at <http://www.joongang.co.kr> (source only available in Korean); Keui-Keun Kim, *The Background Behind the North Korean Ships' Trespasses and Future Courses of Action*, CHOSUN DAILY (June 3, 2001), at <http://www.chosun.co.kr> (source only available in Korean).

11. See 2000 Report to Congress: *Military Situation on the Korean Peninsula*, at <http://www.defenselink.mil/news/Sep2000/korea09122000.html> (Jan. 26, 2001) [*Hereinafter 2000 Report to Congress*].

12. See Dong-Heun Shin & Yong-Won Yoo, *[Continuous Trespass by the North Korean Ships] Incompetent Response . . . Possibility of Nullifying the Maritime Bor-*

nocent passage to North Korea finds little support in international law, the manner in which North Korea decided to exercise its right lacked good faith and creates a strong suspicion that the action was not an innocent passage, but an act of propaganda.

I. LEGAL AND POLITICAL SITUATIONS REGARDING THE TWO KOREAS

A. THE CURRENT SITUATION BETWEEN THE TWO KOREAS

The two Koreas engaged in a bloody conflict for three years, which ceased in 1953.¹³ Although the two Koreas signed an Armistice Agreement, they technically remain in a state of war.¹⁴ The hostility continues, and North Korean spies and spy ships have been found in South Korea and in its waters.¹⁵ During June 1999, the North Korean navy and the South Korean navy exchanged fire on the Yellow Sea, an area that is the subject of a border dispute between the two countries.¹⁶ The South Korean navy sank a North Korean ship, and both sides suffered casualties.¹⁷

Neither Korea has recognized the right of innocent passage by the other through its territorial sea.¹⁸ As a general rule, when North Korean ships have entered South Korea's territorial sea, the South Korean navy has expelled them from the area.¹⁹ The North Korean navy has captured and detained numerous South Korean ships that have entered North Korea's territorial

der Between the North and South, CHOSUN DAILY (June 4, 2001), at <http://www.chosun.co.kr> (source only available in Korean). The South Korean government reached its decision only one day after the North Korean ships' passage. *Id.*

13. See generally MAX HASTINGS, *THE KOREAN WAR* (1987).

14. See generally Special Report of the Unified Command on the Korean Armistice Agreement, July 27, 1953, available at <ftp://ftp.nautilus.org/napsnet/agreements/armistice.txt>, (September 1953) [hereinafter Armistice Agreement] (copy of the Armistice Agreement and background information on the Agreement).

15. See Dong-Heun Shin & Yong-Won Yoo, *Conditional Opening of Territorial Sea: Inevitability of Relocating the Navy Flee to South Sea . . . Difficulties in Surveillance*, CHOSUN DAILY (June 6, 2001), at <http://www.chosun.co.kr> (source only available in Korean).

16. See 2000 Report to Congress, *supra* note 11.

17. See *id.*

18. See Yoo, *supra* note 3.

19. See *id.*

sea.²⁰

B. MARITIME LAW

1. Definition of Territorial Sea

The body of water where the North Korean merchant ships sailed, known as “Cheju Strait”²¹ is part of South Korea’s territorial water under the 1982 United Nations Convention on Law of the Sea (UNCLOS) because the area falls within twelve nautical miles of the coast of South Korea.²² South Korea signed and ratified the UNCLOS.²³ North Korea signed but did not ratify the treaty.²⁴ Under the Vienna Convention on the Law of Treaties, a State that has not ratified a treaty but only signed it is still obliged to refrain from engaging in activities that defeat the object and purpose of the treaty.²⁵ The twelve-mile breadth

20. *See id.*

21. Aside from the rules that apply to territorial water, special rules of maritime law apply to “straits.” “[T]he legal situation in customary law is that straits constitute an autonomous institution. Passage through them is neither high seas passage, because the liberty of choice as to route and behaviour is not as great as in the high seas, nor innocent passage, because that liberty is greater than it is in the territorial sea.” *See* D.P. O’CONNELL, *THE INTERNATIONAL LAW OF THE SEA* 327 (1982). The legal significance of “strait” differs from the word’s ordinary-use meaning. *See id.* at 299. The authorities conflict on the legal definition of “strait.” South Korea denies that the body of water between the southern end of the Korean peninsula and Cheju Island constitutes a “strait” that is used for international navigation and therefore subject to a different rule of international law. *See* Mark J. Valencia, *Policy Paper 33—Northeast Asia: Transnational Navigational Issues and Possible Cooperative Responses*, at http://www-igcc.ucsd.edu/publications/policy_papers/pp3303.html (last visited February 15, 2002). For purposes of this paper, however, it is irrelevant whether Cheju Strait is “strait” or territorial water. Sailing under the right of “innocent passage” is allowed in both territorial sea and “strait” under international law. Had the North Korean ships sailed in the manner that is allowed in the “strait” but not in the territorial sea, the determination whether Cheju Strait is “strait” or not would have been relevant, but such is not the case here.

22. *See* Convention on Law of the Sea, Dec. 10, 1982, art. 3, 1833 U.N.T.S. 397, 400, available at <http://www.un.org/Depts/los.los94st.htm> [hereinafter UNCLOS].

23. *See* Status of the United Nations Convention on the Law of the Sea, of the Agreement relating to the implementation of Part XI of the Convention and of the Agreement for the implementation of the provisions of the Convention relating to the conservation and management of straddling fish stocks and highly migratory fish stocks; Table recapitulating the status of the Convention and of the related Agreements, as at 6 February 2002, at http://www.un.org/depts/los/reference_files/status2002.pdf (February 6, 2001) [hereinafter Status of the United Nations Convention on the Law of the Sea].

24. *See id.*

25. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 18(a),

of territorial water is widely recognized and followed by the states.²⁶ The provisions in UNCLOS relating to navigation reflect customary international law as exercised by many states.²⁷ Accordingly, even states that are not parties to UNCLOS are bound by the provisions of the treaty relating to navigation.

Under UNCLOS, the coastal state enjoys sovereignty within its territorial water.²⁸ Sovereignty is a supreme and independent authority,²⁹ and no obligation can be forced upon a sovereign state either by the international community or by international law.³⁰ There is no international norm on what actions the coastal state may conduct in territorial water by virtue of its sovereignty.³¹ Instead, municipal law of each coastal state governs the scope of states' actions.³²

The right of innocent passage through the coastal state's territorial water is an exception to this sovereignty.³³ Essential interests of numerous states depend on passage through territorial waters, and a coastal state may not harm such interests through unilateral action.³⁴ The International Court of Justice has stated, "[t]he delimitation of sea areas always has an international aspect and cannot be dependent merely upon the will of

1155 U.N.T.S. 332, 336, 8 I.L.M. 679, 686.

26. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 189 (4th ed. 1990); FRANCIS NGANTCHA, *THE RIGHT OF INNOCENT PASSAGE AND THE EVOLUTION OF THE INTERNATIONAL LAW OF THE SEA: THE CURRENT REGIME OF 'FREE' NAVIGATION IN COASTAL WATERS OF THIRD STATES* 16 (1990); O'CONNELL, *supra* note 21, at 167.

27. See Scott C. Truver, *The Law of the Sea and the Military Use of the Oceans in 2010*, 45 LA. L. REV. 1221, 1223 (1985).

28. *Id.* at 1240; NGANTCHA, *supra* note 26, at 21-22, n.105-09 & 111. See UNCLOS, *supra* note 22, art. 2(1), 1833 U.N.T.S. at 400 ("The Sovereignty of a coastal State extends, beyond its land territory and internal waters, to an adjacent belt of sea, described as the territorial sea."). The nature, although not necessarily its scope, of the coastal State's sovereignty over its territorial water does not differ from the sovereignty over its land. "[T]he rights of the coastal State over the territorial sea do not differ in nature from the rights of sovereignty which the State exercises over other parts of its territory. . . . It is also the principle underlying a number of multilateral conventions—such as the Air Navigation Convention of 1919 and the International Civil Aviation Convention of 1944—which treat the territorial sea in the same way as other parts of State territory." NGANTCHA, *supra* note 26, at 7.

29. See NGANTCHA, *supra* note 26, at 22.

30. See *id.*

31. See O'CONNELL, *supra* note 21, at 82-83.

32. See *id.*

33. BROWNLIE, *supra* note 26, at 194. See also UNCLOS, *supra* note 22, art. 17-18, 1833 U.N.T.S. at 404; NGANTCHA, *supra* note 26, at 38.

34. See NGANTCHA, *supra* note 26, at 42 ("[T]he freedom of navigation is of such great importance to all States").

the coastal States as expressed in its municipal law.”³⁵ In other words, while the coastal state enjoys sovereignty over its territorial water, the extent of its sovereignty over its ocean waters is comparatively less than its sovereignty over land.

2. *The Right of Innocent Passage through Territorial Sea*

Customary international law recognizes the right of innocent passage through other states’ territorial sea.³⁶ To understand that right further, it is necessary to clarify the meaning of “innocent passage.” International law scholars have debated over the meaning of the word “innocent.”³⁷ While scholars have attempted to define the term in an objective manner, subjective interpretation by the coastal state also often defines the meaning of “innocent.”³⁸ Generally, if a ship does not harm the interests of the coastal state during or by its sail through the territorial water, then the passage is deemed innocent.³⁹ “Passage” means to navigate through the territorial water without having contacts with the territory of the coastal state.⁴⁰ Stopping or anchoring pursuant to ordinary navigation, or because of danger or distress, does not discontinue the ship’s passage.⁴¹

3. *Limitation on the Right of Innocent Passage*

Article 19, paragraph 1 of the UNCLOS provides that passage that is “prejudicial to the peace, good order or security of the coastal State” is not innocent.⁴² Article 19, Paragraph 2 of the UNCLOS lists the following examples of non-innocent passage:

Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea

35. O’CONNELL, *supra* note 21, at 33 (quoting Anglo-Norwegian Fisheries, 1951 I.C.J. 116, 132).

36. See BROWNLIE, *supra* note 26, at 305; NGANTCHA, *supra* note 26, at 32 (“[A]s a general principle, the right of innocent passage requires no supporting argument or citation of authority; it is firmly established in international law.”).

37. See NGANTCHA, *supra* note 26, at 43-52 (summarizing the historical debate on the meaning of the term “innocent”); O’CONNELL, *supra* note 21, at 271-72 (summarizing four established views of the meaning of “innocent” and presenting other possibilities.).

38. See *supra* note 38.

39. See *supra* note 38.

40. See NGANTCHA, *supra* note 26, at 52.

41. See *id.* at 54-55.

42. UNCLOS, *supra* note 22, 1833 U.N.T.S. at 404.

it engages in any of the following activities:

(a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

(b) any exercise or practice with weapons of any kind;

(c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;

(d) any act of propaganda aimed at affecting the defence or security of the coastal State;

(e) the launching, landing or taking on board of any aircraft;

(f) the launching, landing or taking on board of any military device;

(g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;

(h) any act of willful and serious pollution contrary to this Convention;

(i) any fishing activities;

(j) the carrying out of research or survey activities;

(k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;

(l) any other activity not having a direct bearing on passage.⁴³

The meaning of the phrase "prejudicial to the peace, good order or security" has been open to subjective interpretation by the coastal state.⁴⁴ In addition to the examples given in the UNCLOS, international legal scholars hold various views on the meaning of a non-innocent passage. If the ship carries cargo or persons that may pose danger to the coastal state, the passage is not innocent.⁴⁵ If the ship enters the territorial sea with the intention of committing activities other than mere passage,⁴⁶ or if the ship commits an action that threatens the coastal state,

43. *Id.* at 404-05 (emphasis added).

44. *See* Truver, *supra* note 27, at 1240.

45. *See* O'CONNELL, *supra* note 21, at 272.

46. *See id.*

the passage is also not innocent.⁴⁷ Others argue that even if the ship takes no overt action, if its mere presence arouses the concern of the coastal state, then the passage is not innocent.⁴⁸ Since the coastal state enjoys sovereignty over its territorial sea, except for the right of innocent passage,⁴⁹ the coastal state may lawfully deny any non-innocent passage.

Moreover, despite the right of innocent passage, state practice demonstrates that even if the passage is innocent, coastal states have denied the right of passage for reasons of national security.⁵⁰ On June 23, 1995, for example, France suspended all navigation in the territorial waters of Mururoa.⁵¹ France planned nuclear weapons tests later that year.⁵² On July 10, a Greenpeace vessel named *Rainbow Warrior II* attempted to enter the Mururoaen territorial water.⁵³ The French navy boarded the *Rainbow Warrior II*, arrested the crew, and seized the vessel.⁵⁴ Although Article 25, Paragraph 3 of UNCLOS provides that "[t]he coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security,"⁵⁵ France's action fell outside of the provision because the suspension was not temporary.⁵⁶ The UNCLOS does not allow for prolonged suspension,⁵⁷ but the international community appar-

47. See *id.*

48. See *id.* at 272, nn.93 & 98.

49. See Truver, *supra* note 27, at 1240.

50. See Donald R. Rothwell, *The Mururoa Exclusion Zone*, at <http://law.uniserve.edu.au/law/pub/icl/lawofsea/mururoa.html> (last visited Apr. 4, 2002).

51. See *id.*

52. See *id.*

53. See *id.*

54. See *id.* Rothwell writes, "The Mururoa Exclusion Zone demonstrates that despite the attempts made in UNCLOS to more clearly define coastal state rights and obligations with respect to the right of innocent passage, it remains a potentially fragile right. Coastal states may still take action, either in conformity with UNCLOS or under exceptions based on national security grounds, that will not only hamper passage but also completely terminate the right." *Id.*

55. UNCLOS, *supra* note 22, 1833 U.N.T.S. at 407.

56. See *id.*

57. Some authors argue that since the security of a State is such an essential interest, different rules of treaty interpretation should apply for the matters of national security. "The right of a State to adopt the course which it considers best suited to the exigencies of its security and to the maintenance of its integrity, is so essential a right that, in case of doubt, [treaty] stipulations cannot be interpreted as limiting it, even though these stipulations do not conflict with such an interpretation." NGANTCHA, *supra* note 26, at 198.

ently approved the French action.⁵⁸

4. War and International Law

Different rules of international law, including maritime law, apply during war. While multilateral treaties usually remain effective during a war between signatory states, certain treaties are terminated in times of war.⁵⁹ Some argue that war terminates the treaties that guarantee personal rights, such as the right to navigate territories of another state.⁶⁰ A state may attack enemy ships in national water as well as on the high seas.⁶¹ In other words, during war the coastal state may lawfully attack enemy ships that are sailing through its territorial seas, even if their passage is innocent.⁶²

War does not, however, excuse all restrictions on passage. In the famed *Corfu Channel Case*, Albania challenged the innocence of British warships' passage through its territorial water as a defense to a claim Britain brought against Albania for damage to its ships.⁶³ Four British warships sailed through the Albanian water, and mines damaged two of them.⁶⁴ The International Court of Justice held that the passage by the British warships was innocent, and Albania was responsible for the damages that the United Kingdom suffered.⁶⁵

The surrounding circumstances and the restrictions that Albania imposed on the passage of ships are important to consider. Greece and Albania were in a state of war.⁶⁶ Albania informed the British Government that it should notify Albania prior to attempting to send ships through the Corfu Channel.⁶⁷

58. "The failure by states to protest against the French declaration . . . also demonstrates that states value the latitude under the law of the sea to completely close their territorial sea to foreign vessels in certain limited circumstances." Rothwell, *supra* note 50.

59. See MCNAIR, *THE LAW OF TREATIES* 696, 723 (1961).

60. See, e.g., *Karnuth v. United States*, 279 U.S. 231 (1929) (holding that the Jay Treaty of 1794, which guaranteed British subjects right to navigate and travel within the U.S. territory had been terminated by the war of 1812 between the United States and United Kingdom). But see MCNAIR, *supra* note 59, at 714 (noting that the Supreme Court's decision was criticized by numerous international scholars).

61. See O'CONNELL, *supra* note 21, at 326.

62. See *id.*

63. *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 10.

64. See O'CONNELL, *supra* note 21, at 326.

65. See *Corfu Channel*, 1949 I.C.J. at 32.

66. See O'CONNELL, *supra* note 21, at 309.

67. *Id.*

Albania contended that notice was necessary as a matter of national security.⁶⁸ The Court disagreed, holding, "Albania, in view of these exceptional circumstances, would have been justified in issuing regulations in respect of the passage of warships through the strait, but not in prohibiting such passage or in subjecting it to the requirement of special authorization."⁶⁹ It appears from this decision that a state may not restrict the right of innocent passage, at least passage by a neutral state, even during time of war and for the purpose of national security.⁷⁰ The Court also held that the use of force to stop the ships' innocent passage violated international law.⁷¹

5. *Armistice Agreements and the Right to Navigate*

The Korean Armistice Agreement indicates that fighting has ceased, but the war has not ended.⁷² Unlike a peace treaty, an armistice agreement does not carry the effect of normalizing the relationship between states.⁷³ As with any other agreement between the states, the respective parties are bound by the terms of the agreement.⁷⁴ Armistice agreements typically exist for a brief time, until the party states sign a peace treaty.⁷⁵ Only a few incidents concerning navigation rights and armistice agreements have arisen. An event that occurred between Egypt and Israel during the 1950s is one such example.⁷⁶ During the Israeli Independence War, Israel and four Arab states—Egypt, Jordan, Lebanon, and Syria—entered into an armistice agreement.⁷⁷ Even after signing the agreement, Egypt continued to forbid Israeli ships from sailing through the Suez Canal.⁷⁸ The UN Mixed Armistice Commission held that Egypt was illegally

68. *See id.*

69. *See Corfu Channel*, 1949 I.C.J. at 29-30.

70. *See id.*

71. Although the Court did not find that Albania laid the mines, it held that Albania was responsible because the mines were laid within the territory of Albania with the presumed knowledge of the Albanian government. *See Corfu Channel*, 1949 I.C.J. at 29.

72. *See* Jewish Virtual Library, *Maritime Object to Suez Canal Blockade*, at <http://www.us-israel.org/jsource/History/object.html> (Aug. 1951).

73. *See id.*

74. *See id.*

75. *See id.*

76. *See id.*

77. *See* Jewish Virtual Library, *The Suez War of 1956*, at http://www.us-israel.org/jsource/History/Suez_War.html (last visited Jan. 30, 2002).

78. *See id.*

blocking the canal.⁷⁹ Later, the Security Council ordered Egypt to open the canal to Israeli ships.⁸⁰ Egypt refused to comply with the Security Council's order, and Israel later launched a successful military attack on Egypt.⁸¹ During the Security Council debate, representatives from numerous states insisted that Egypt lift its restriction in the spirit of the armistice agreement.⁸²

C. INTERNATIONAL TRADE AND THE PASSAGE THROUGH SOUTH KOREA'S TERRITORIAL WATERS

1. *Right of Innocent Passage and Trade*

International trade depends heavily on maritime navigation.⁸³ The importance of maritime trade has been noted from the early days of international law,⁸⁴ when Grotius wrote, "the most specific axiom of the law of nations: called a primary rule or first principle, the spirit of which is self-evident and immutable, to wit: every nation is free to travel to every other nation and to trade with it."⁸⁵ Depending on its route, it is occasionally

79. See *id.* Ralph Bunche, the UN negotiator who brought Israeli and other Arab States to the negotiation table to sign the Armistice Agreement, said that "[t]here should be free movement for legitimate shipping and no vestiges of the wartime blockade should be allowed to remain, as they are inconsistent with both the letter and the spirit of the armistice agreement." *Id.*

80. See *id.* Article 25 of the U.N. Charter provides that "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council. . . ." Egypt, as a member of the U.N., should have obeyed the decision of the Security Council. Article 39 of the Charter further states: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 (concerning measures not involving the use of armed force) and 42 (concerning measures involving the use of armed force), to maintain or restore international peace and security." U.N. CHARTER, art. 39.

81. See Jewish Virtual Library, *supra* note 77.

82. See Jewish Virtual Library, *supra* note 72.

83. See Dana R. Dillon, *The Heritage Foundation Backgrounder: How the Bush Administration Should Handle China and South China Sea Maritime Territorial Disputes* (Sept. 5, 2001), available at <http://www.heritage.org/library/backgrounder/bg1470.html>. Over 90 percent of cross-border trade moves via ships. *Id.*

84. See, e.g., NGANTCHA, *supra* note 26, at 116, n.3 (quoting W.E. PER HALL, A TREATISE ON INTERNATIONAL LAW 198 (8th ed. 1924) ("The interests of the whole world are concerned in the possession of the utmost liberty of navigation for the purposes of trade by the vessels of all States.")).

85. See *id.* at 64 n.4. Grotius also wrote, "[L]ands, rivers, and any part of the sea that has become subject to the ownership of a people ought to be open to those who, for legitimate reasons, have need to cross over them. . . ." *Id.* at n.5.

necessary for a vessel to sail into other states' territorial seas to reach its destination. The right of innocent passage promotes trade by allowing ships to sail through territorial seas.⁸⁶

2. *Significance of North Korea's Ability to Sail Through Cheju Strait*

Until June 2001, North Korean ships sailed around the south of Cheju Island to sail between the east and west coasts of North Korea.⁸⁷ North Korean vessels can shorten their trips between their two shores by 300 to 400 nautical miles if they sail through the Cheju Strait.⁸⁸ Sailing through the strait can also shorten a trip from the west coast of North Korea to Japan⁸⁹ or other countries east of North Korea, such as the United States.⁹⁰ By being able to sail through the Cheju Strait, North Korea may be able to engage more actively in international trade.

II. LEGALITY OF THE EVENT IN QUESTION

A. WERE THE NORTH KOREAN SHIPS SAILING THROUGH SOUTH KOREA'S TERRITORIAL WATER?

Cheju Strait is a part of South Korea's territorial water.⁹¹ UNCLOS and customary international law recognize a twelve-mile limit on territorial water, and Cheju Strait falls within the twelve-mile zone extended from the southern shore of South Korea.⁹² Since South Korea has signed and ratified UNCLOS,⁹³ it may enforce a twelve-mile territorial water zone around its

86. See *id.* at 96 ("One of the major reasons for the existence of the right of innocent passage was—and still is—to encourage, facilitate and promote such [international] trade.").

87. See Kim, *supra* note 1.

88. See Kim, *supra* note 4.

89. Japan is North Korea's largest export trading partner (amounting 27.9% of the North Korea's total export), and the second largest import trading partner (amounting 17% of the North Korea's total import). Gerald P. O'Driscoll, et al., *2002 Index of Economic Freedom*, The Heritage Foundation (Sept. 2001), at <http://www.heritage.org/index/2002/chapters/pdf/2002Index.pdf>. (The index specified that the data regarding the export partners are based on estimate).

90. North Korea is currently trading only with Japan, South Korea, China, Germany, and Russia. See *id.*

91. See *supra* notes 1-3 and accompanying text.

92. See Kim, *supra* note 1.

93. See Status of the United Nations Convention on the Law of the Sea, *supra* note 23, at 11.

shore.⁹⁴ In addition to being a signatory state to UNCLOS,⁹⁵ North Korea is bound by the rules of customary international law, which recognizes the twelve-mile zone of territorial water.⁹⁶ Accordingly, North Korea must consider and respect Cheju Strait as part of South Korea's territorial water.

Since Cheju Strait is South Korea's territorial water, South Korea may exercise sovereignty over the water.⁹⁷ South Korean law governs the actions that the South Korean government may take within the Cheju Strait.⁹⁸ The South Korean government guarantees the right of innocent passage to foreign vessels sailing through the Cheju Strait.⁹⁹ The South Korean navy has military regulations mandating expulsion of North Korean ships that enter Cheju Strait, even if they are civilian vessels.¹⁰⁰ Article 6 of the South Korean Maritime Law provides that when a suspicion exists that a foreign ship conducted its passage in a non-innocent manner, the vessel may be stopped, searched, seized or subject to other courses of action.¹⁰¹

B. WAS THE PASSAGE OF NORTH KOREAN SHIPS INNOCENT?

While the territoriality of Cheju Strait is clear, the innocence of the North Korean ships' passage is not. The ships appeared to sail in an innocent manner,¹⁰² but their intention might have been different. Both the terms of the UNCLOS and the reaction of the South Korean public to the sail of the ships lead to the suspicion that the sail was not innocent.

North Korea could argue that the passage of its ships was innocent. The ships were merchant ships, not military vessels.¹⁰³ One of the ships was carrying relief supplies from the UN,¹⁰⁴ and another ship was sailing to China to transport fertil-

94. See UNCLOS, *supra* note 22, 1833 U.N.T.S. at 400.

95. See Status of the United Nations Convention on the Law of the Sea, *supra* note 23, at 3.

96. See *supra* note 22 and accompanying text.

97. See *supra* notes 27-32 and accompanying text.

98. See *supra* notes 29-32 and accompanying text.

99. See Kim, *supra* note 1.

100. See Yoo, *supra* note 3. The military regulation also provides that firing on ships that are sailing through Cheju Strait is only allowed during cases of extreme emergency. See e.g., Yong-Jong Lee, *How the North Korean Merchant Ship Tae Hong Tan Ho Was Expelled*, CHOSUN DAILY (June 14, 2001), at <http://www.chosun.co.kr> (source only available in Korean).

101. See Lee, *supra* note 100.

102. See discussion of the innocence of the North Korean passage *infra*.

103. See Kim, *supra* note 1; see also *supra* text accompanying note 1.

104. See Yoon, *supra* note 6.

izers.¹⁰⁵ They did not conduct any military activity, nor did they pollute the area or attempt to perform economic activity, such as fishing.¹⁰⁶ The ships did not stop or anchor within South Korea's territorial sea.¹⁰⁷ Arguably, the North Korean ships were enjoying the right of innocent passage that was guaranteed to all other foreign ships sailing through Cheju Strait.¹⁰⁸

On the other hand, surrounding circumstances¹⁰⁹ suggest that the sail of the North Korean ships was an act of propaganda, not one of passage. If an ulterior motive existed, the ships' passage was not innocent.¹¹⁰ Article 19, Paragraph 2(d) of UNCLOS provides that if a ship commits "[a]ny act of propaganda aimed at affecting the defense or security of the coastal State," its passage is not innocent.¹¹¹

The sail of North Korean ships affected and weakened South Korea's defense. During the sail, four South Korean navy vessels had to follow the North Korean ships.¹¹² North Korean spy ships could disguise themselves as merchant ships and sail into South Korean water.¹¹³ Submarines may hide underneath merchant ships that are otherwise sailing innocently, making themselves undetectable by the South Korean navy.¹¹⁴ Even if North Korea does not explicitly commit those actions, the possibility of such actions forces the South Korean navy to increase its presence on Cheju Strait, affecting defense and security.¹¹⁵

The sail of the North Korean ships could have been an act of propaganda rather than an innocent passage. The key to determining the innocence of the North Korean ships' sail lies in their intentions.¹¹⁶ In other words, if the ships did not intend to affect the defense or security of South Korea through their passage, then their sail still was innocent even if it unintentionally disrupted South Korea's defense or security.¹¹⁷

105. See *id.* Fertilizers are necessary to relieve the food shortage in North Korea. See 2000 Report to Congress, *supra* note 11.

106. See *supra* notes 1-5.

107. See *supra* notes 1-5.

108. See Yoon, *supra* note 6.

109. South Korea and North Korea are, technically, still at war. See *supra* notes 14-17 and accompanying text.

110. See *supra* Part I.B.3.

111. See UNCLOS, *supra* note 22, 1833 U.N.T.S. at 404.

112. See Yoon, *supra* note 6.

113. See Kim, *supra* note 10.

114. See *id.*

115. See *id.*

116. See text accompanying notes 49-52.

117. See UNCLOS, *supra* note 22, 1833 U.N.T.S. at 404.

It is difficult to determine whether North Korea intended to affect South Korea's defense or security,¹¹⁸ or sought a shorter passage to save time and money.¹¹⁹ Most likely, it intended to achieve both ends. Given the history of hostility,¹²⁰ it is reasonable to infer that North Korea would have known the passage of its ships would disrupt South Korea's defense system.¹²¹ If North Korea did intend to affect the defense or security of South Korea, the South Korean navy could have rightfully interfered with the North Korean ships' passage.¹²²

In addition to the examples specified in Article 19 of UNCLOS,¹²³ South Korea could have determined the innocence of passage based on its subjective interpretation.¹²⁴ It could have argued that the mere presence of ships¹²⁵ that belong to a hostile nation disrupted the sense of peace in South Korea. The public unrest that in fact took place in South Korea exemplifies such disruption.¹²⁶ Although the ships were merchant vessels, and not military vessels, the sudden appearance of enemy ships in South Korea's territory was sufficient to cause confusion and fear,¹²⁷ which was prejudicial to the peace and order of South Korea. The fact that North Korea could have predicted that reaction by the South Korean public¹²⁸ casts more doubt on the

118. See *supra* text accompanying notes 109-115.

119. See Kim, *supra* note 10.

120. See *supra* notes 13-20 and accompanying text.

121. See *supra* notes 13-20 and accompanying text. North Korea had alternatives to exercising the right of innocent passage in South Korean water. North Korea could have informed the South Korean authorities ahead of time, explaining that the purpose of their sail was peaceful, and that there was no need for the South Korean navy to follow them. North Korea could also have sought an agreement with South Korea, specifying numbers and types of North Korean ships permitted to sail through the Cheju Strait. The South Korean navy could have better tracked the movement of North Korean ships if such prior arrangements had been made between the two Koreas. In addition, the South Korean public would not have been startled by the presence of the North Korean ships, and the peace and order of South Korea would not have been disturbed. See *supra* notes 13-20 and accompanying text.

122. Since North Korea has not ratified UNCLOS, it is not bound by the specific provisions of the Convention. See *supra* note 23 and accompanying text. North Korea is still bound, however, to conduct innocent passage when it sails through another State's territorial water, because the rules of law concerning innocent passage are customary international law. See *supra* notes 36 and accompanying text.

123. See UNCLOS, *supra* note 22, 1833 U.N.T.S. at 404-05.

124. See *supra* text accompanying note 38.

125. See UNCLOS, *supra* note 22, 1833 U.N.T.S. at 404-05.

126. See *supra* notes 1-7 and accompanying text.

127. See *supra* notes 1-3 and accompanying text.

128. See 2000 Report to Congress, *supra* note 11. Because of the history of conflict between the two Koreas, each side views any sudden action by the other side

possibility that the North Korean ships intended mere passage. South Korea could convincingly argue that the sail of the North Korean ships was an act of propaganda and not an innocent passage.

C. ASSUMING THAT THE PASSAGE OF THE NORTH KOREAN SHIPS WAS INNOCENT, COULD SOUTH KOREA STILL DENY PASSAGE ON THE CLAIM OF NATIONAL SECURITY?

Even if the sail of the North Korean ships was innocent, South Korea still could have forbidden their sail under a claim of national security. International law is not clear on whether and when a coastal state may deny the right of innocent passage for the purpose of protecting national security. The French suspension of passage around Mururoa Atoll and other states' silent approval of the French action suggest that a coastal state may suspend even innocent passages for national security reasons.¹²⁹ The *Corfu Channel* case suggests otherwise.¹³⁰

On one hand, national security is such a compelling interest of a State that it should arguably justify denial of passage through the state's territorial water.¹³¹ The French government took this position when it suspended all navigation on the territorial waters of Mururoa Atoll.¹³² The French government suspended even innocent passage, citing national security as the justification for the restriction.¹³³ The exclusion violated Article 25 Paragraph 3 of UNCLOS, because the suspension was not temporary.¹³⁴

The Mururoaen incident does not yield any conclusive determination on the appropriateness of South Korean action, however, because the facts differ between the two incidents. In the Mururoaen exclusion zone, France forbade ships from all

with extreme suspicion and caution. Had North Korea mentioned or announced an intent to exercise the right of innocent passage in Cheju Strait, there would have been less surprise among the South Korean public. Although no rule of international law requires North Korea to announce its plan to sail, doing so would have cast less doubt on whether the passage was innocent (i.e., for the sole purpose of sailing) or non-innocent (i.e., with the purpose of sailing to startle the South Korean public). *Id.*

129. See *supra* notes 50-58 and accompanying text.

130. See *supra* notes 63-71 and accompanying text.

131. See NGANTCHA, *supra* note 26, at 198.

132. See Rothwell, *supra* note 50.

133. See *id.* France planned to conduct a nuclear testing in the area. *Id.*

134. See UNCLOS, *supra* note 22, 1833 U.N.T.S. at 407.

nations from sailing in the zone.¹³⁵ South Korea specifically excluded the North Korean ships, while the ships from other nations freely exercised their right of innocent passage.¹³⁶ Such discriminatory exclusion directly violated Article 25 Paragraph 3 of UNCLOS.¹³⁷

The South Korean violation of the article is, arguably, a more serious violation than the French violation of the same article.¹³⁸ The South Korean suspension singles out a state and deprives it of a right that is guaranteed to all other states. Further, the French suspension eventually ended after nuclear testing was conducted, but the South Korean suspension lasted for nearly half a century¹³⁹ and presumably would have lasted indefinitely.

The holding in *Corfu Channel* opposes the proposition that the national security interest of the coastal state justifies denial of the right of innocent passage.¹⁴⁰ Although Albania was in a state of war, and the presence of warships in its water could have jeopardized its national security interest,¹⁴¹ the International Court of Justice held that the British warships could have rightfully sailed through the Albanian water as long as their passages were innocent.¹⁴²

Corfu Channel, however, also does not yield a conclusive determination on the appropriateness of the South Korean action. *Corfu Channel* was decided nearly a half century ago. The rule of international law changes over time. Contemporary publicists describe the right of innocent passage as a "potentially fragile right," or an "imperfect right,"¹⁴³ and the current trend is that sovereignty of the coastal state trumps the right of innocent passage.¹⁴⁴ It is unclear whether the trend is so common and widely practiced that it allows the coastal state to suspend the

135. See Rothwell, *supra* note 50.

136. See Yoon, *supra* note 6.

137. "The coastal State may, *without discrimination in form or in fact among foreign ships*, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. . . ." UNCLOS, *supra* note 22, 1833 U.N.T.S. at 407 (emphasis added).

138. See Rothwell, *supra* note 50.

139. See *id.*

140. See *supra* text accompanying notes 69-71.

141. See *supra* note 66-68 and accompanying text.

142. See text accompanying notes 69-71.

143. NGANTCHA, *supra* note 26, at 197-98.

144. "[The right of innocent passage] appears today as a vestige of history under the constant assault of an ever-expanding notion of sovereignty." *Id.* at 194.

right of innocent passage on its territorial water for national security reasons. In light of the conflicting opinions,¹⁴⁵ South Korea could have suspended the North Korean ships' sail with some support from the international law, even if the passage was innocent.

D. SHOULD THE ARMISTICE AGREEMENT HAVE AFFECTED NORTH KOREA'S RIGHT OF INNOCENT PASSAGE?

Prior to the sail of the North Korean vessels on June 2, 2001, the South Korean government denied the right of innocent passage to the North Korean ships in violation of UNCLOS, claiming the uniqueness of the armistice agreement between the two Koreas.¹⁴⁶ It is true that different rules of international law apply during peacetime and wartime, and the state of armistice is not a state of peace.¹⁴⁷ Analysis of the Suez Canal incident, however, suggests that South Korea's claim was not valid.¹⁴⁸ If armistice implies a duty to promote peace, then the situation of armistice did not justify South Korea's denial of the right of innocent passage to North Korea.

The Suez Canal incident illustrates this principle. Egypt denied the right of passage to Israeli ships that attempted to sail through the canal.¹⁴⁹ Even after the armistice agreement was signed, Egypt continued to deny access to the canal.¹⁵⁰ Egypt attempted to justify its action by referring to the special circumstances between Egypt and Israel.¹⁵¹ Various states criticized Egypt, however,¹⁵² and the Security Council later ordered Egypt to open the canal to Israeli ships.¹⁵³ While it is true that the state of war continued to exist during armistice,¹⁵⁴ the two States, as the parties to the armistice agreement, should have strived to achieve peace.¹⁵⁵ Egypt continued to restrict Israel's

145. See text accompanying notes 129-143.

146. See *supra* note 18 and accompanying text.

147. See *supra* notes 72-75 and accompanying text.

148. See *supra* notes 76-82 and accompanying text.

149. See *supra* notes 72-75 and accompanying text.

150. See *supra* notes 72-75 and accompanying text.

151. See Jewish Virtual Library, *supra* note 72 (Comment by Sir Gladwyn Jebb, delegate from the United Kingdom).

152. See *id.*

153. See *supra* note 80 and accompanying text.

154. See Jewish Virtual Library, *supra* note 72 (Comment by Mr. Muniz, delegate from Brazil).

155. "It is the essence of the amnesties to be a step leading to permanent peace." *Id.*

right long after the armistice agreement was signed, hampering the peace effort.¹⁵⁶

The Suez Canal incident reflects the will of the Security Council. Condemnation of Egypt's action by a wide variety of states, such as France, the United States, and Brazil,¹⁵⁷ suggests that a state consensus existed for the proposition that the state of armistice does not excuse the denial of navigational right.

The situation between North and South Korea is comparable to the situation between Egypt and Israel because the two Koreas entered into the armistice agreement to strive toward peace.¹⁵⁸ The purpose of the armistice agreement between the two Koreas was to "ensure a complete cessation of hostilities . . . until a final peaceful settlement is achieved."¹⁵⁹ South Korea's denial of North Korea's right to innocent passage has hampered the effort to reach the peaceful settlement. Nearly half a century has passed since the armistice agreement was signed,¹⁶⁰ and a continued restriction on passage that discriminates against North Korea was a regression in the two Koreas' effort for peace.¹⁶¹ Accordingly, North Korea could have rightfully ignored South Korea's claim that it properly denied the right of innocent passage in Cheju Strait to the North Korean vessels because of the state of armistice.

E. COULD SOUTH KOREA HAVE USED FORCE TO STOP THE NORTH KOREAN SHIPS?

Although the South Korean navy did not use force to expel the North Korean ships,¹⁶² the option was available to them. Whether such action would have been justified under international law is a different matter. If the passage of the North Korean ships was not innocent, then the South Korean navy could

156. "My Government believes that the imposition of these restrictions [Egypt's denial of passage through Suez Canal for Israeli ships] and their maintenance for so long a period after the signing of the armistice agreement is a retrogression from what both parties committed themselves to—namely, the establishment of permanent peace. . . ." *Id.* (emphasis added). See Jewish Virtual Library, *supra* note 72 (Comment by Mr. Warren R. Austin, delegate from the United States). The armistice agreement was signed on 1949, and Mr. Austin made his comment in 1951. *Id.*

157. See *Armistice Agreement*, *supra* note 14, at pmb1.

158. See *id.*

159. *Id.*

160. See *supra* notes 13-14 and accompanying text.

161. See Jewish Virtual Library, *supra* note 72.

162. See *supra* text accompanying notes 1-8.

use force to stop them from sailing through Cheju Strait.¹⁶³ If, for instance, their sail was an act of propaganda aimed at disrupting the defense and security of the South Korea, the country would be justified in taking actions.¹⁶⁴ If the passage of the North Korean ships was innocent, however, it is not certain whether the use of force would have been justified.

Were the ships' passage not innocent, South Korea could have used force to discontinue their passage both under UNCLOS and under its municipal law.¹⁶⁵ Article 25 Paragraph 1 of UNCLOS provides: "The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent."¹⁶⁶ While Article 279 of the Convention requires the states to use "peaceful means" to resolve disputes regarding the Convention,¹⁶⁷ a "necessary step" could entail use of force in certain situations. The North Korean ships repeatedly refused the South Korean navy's request to sail out of the Cheju Strait and use an alternative route.¹⁶⁸ Force, arguably, was the only certain way to discontinue their passage.

Since the coastal state enjoys sovereignty over its territorial water,¹⁶⁹ municipal law determines what the appropriate action is within the water.¹⁷⁰ The South Korean navy is authorized to expel North Korean vessels from the Cheju Strait.¹⁷¹ It is also authorized to use force to stop the non-innocent passage of foreign ships.¹⁷² If the sail of the North Korean ships was an act of propaganda and not an innocent passage, then the South Korean navy could have justifiably used force to stop their passage.¹⁷³

If the ships were conducting innocent passage, the international law is less clear. Different rules apply during states of war and of peace.¹⁷⁴ During a state of war, enemy ships may be attacked regardless of the innocence of their passage.¹⁷⁵ The

163. See *supra* text accompanying notes 100-101.

164. See *supra* text accompanying notes 109-128.

165. See *supra* text accompanying notes 100-101.

166. See UNCLOS, *supra* note 22, 1833 U.N.T.S. at 407.

167. See UNCLOS, *supra* note 22, 1833 U.N.T.S. at 508.

168. See Yoon, *supra* note 6.

169. See *supra* note 28.

170. See *supra* text accompanying note 31.

171. See *supra* text accompanying notes 100-101.

172. See *supra* text accompanying notes 100-101.

173. See *supra* text accompanying notes 31, 100-101.

174. See *supra* notes 59-62 and accompanying text.

175. See O'CONNELL, *supra* note 21 at 326; see also *supra* text accompanying note 21.

South Korean navy would not have been justified in using force against the North Korean ships under this argument, however, because the two Koreas are in the state of armistice.¹⁷⁶ Depending on the degree of force the South Korean navy might have used, the armistice agreement could have been breached and the two Koreas could have fallen into a state of full-blown war.¹⁷⁷

The Mururoa incident suggests that the use of some degree of force may be justified, even in peacetime, under some circumstances.¹⁷⁸ Citing national security reasons, the French navy forcibly boarded the Greenpeace vessel that sailed into the French territorial water near Mururoa Atoll in violation of the suspension order.¹⁷⁹ The navy used teargas to subdue the crew, arrested them, and seized the vessel.¹⁸⁰ It used an extreme degree of force, short of firing on or sinking the vessel. Other states did not criticize France, however, which indicates that they approved the French action.¹⁸¹

The North Korean ships were unarmed merchant vessels.¹⁸² They claimed that they were sailing to transport humanitarian aid.¹⁸³ Had the South Korean navy used force on those vessels, as the French Navy did to the Greenpeace vessel, it would have caused an international uproar. If the passage of the North Korean ships was not innocent but was an act of propaganda, the South Korean navy would have had legal justifications to use force, but it still would have faced international criticism for doing so. The South Korean navy wisely refrained from using force.

176. See *Armistice Agreement*, *supra* note 14; see also *supra* text accompanying note 14.

177. See Jewish Virtual Library, *supra* note 72.

178. See *supra* notes 50-58 and accompanying text. One could argue that the sail of the Greenpeace vessel was not innocent under Article 19, Paragraph 2(d) of the UNCLOS, because the sail was an act of propaganda, and the French navy therefore justifiably forbade its sail under the UNCLOS. See Rothwell, *supra* note 50. While the sail was undoubtedly an act of propaganda, it must also have been aimed at affecting the security or defense of state to constitute a non-innocent passage. The Greenpeace vessel aimed at protesting against nuclear testing, but it is highly implausible to claim that the purpose of its sail was to affect the defense, security or domestic peace of France. See *id.* Rothwell writes under the assumption that the sail of the Greenpeace vessel was an innocent passage. See *id.*

179. See *supra* note 54 and accompanying text.

180. See Rothwell, *supra* note 50.

181. See *id.*

182. See *supra* notes 1-7 and accompanying text.

183. See Yoon, *supra* note 6.

CONCLUSION

The South Korean assertion that the state of armistice generally justifies denying the right of innocent passage to North Korean vessels finds little support in international law. The Security Council resolution on the Suez Canal incident even suggests that South Korea might have been violating international law by denying the right to North Korea.

Regarding the sail of the North Korean vessels on June 2, 2001, however, South Korea had numerous arguments to justify denial of passage. It is highly questionable that the sail of the North Korean ships on June 2 was motivated by innocent intent. Most likely, the sail was an act of propaganda with an ulterior motive to disrupt the defense system of South Korea. The South Korean navy could have justifiably used force to stop the ships' non-innocent passage. Even if the sail of the North Korean ships was innocent, the Mururoaen incident suggests that a state may deny the right of innocent passage for national security purpose. South Korea had multiple arguments to deny the passage to the North Korean vessels on June 2, and it approved the North Korean vessels' sail perhaps too hastily. Had South Korea disapproved of the vessels' passage, however, it would have had difficulty justifying the use of force.